No. 89-456

(3)

In The

Supreme Court of the United States

October Term, 1989

VINTAGE ENTERPRISES, INC.,
Debtor in Possession,

Petitioner,

v.

WAYNE JAYE AND CAROLYN JAYE,

Respondents.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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INTRODUCTION

Petitioner Vintage Enterprises, Inc., Debtor in Possession ("Vintage" or "Petitioner"), files this Reply to arguments first raised in the Brief of Respondents Wayne Jaye and Carolyn Jaye in Opposition to Petition for a Writ of Certiorari to the Supreme Court of Alabama.

Respondents make three arguments in opposition to Vintage's Petition: (1) that Vintage's due process challenge was not properly preserved or presented for review before the Alabama Supreme Court; (2) that, even though Petitioner raised the due process issue, the Alabama

Supreme Court failed to rule on it; and (3) that the post-trial review of jury verdicts in Alabama rectified the constitutional flaws in Alabama's former punitive damages law.[1] As demonstrated below, each of these arguments is without support in law or fact.

ARGUMENT

First, citing various Alabama cases, Respondents contend that Vintage's due process challenge was not properly before the Alabama Supreme Court. Respondents, however, conveniently ignore a long line of cases holding that where, as here, the highest available state court has ruled on an issue, this Court will not concern itself with whether the state court could have ruled, as a matter of state law, that the issue was not preserved for appellate review. *See, e.g., Orr v. Orr*, 440 U.S. 268, 275 (1979); *Harlin v. Missouri*, 439 U.S. 459 (1979); *Jenkins v. Georgia*, 418 U.S. 153 (1974); *Raley v. Ohio*, 360 U.S. 423, 436 (1959); C.

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[1] Respondents suggest that Vintage's bankruptcy is unrelated to the judgment in this case. This remarkable statement hardly merits comment. Suffice it to say that the bankruptcy was filed two months after the Alabama Supreme Court opinion was issued and on the eve of a foreclosure hearing in Henderson, North Carolina. That hearing involved Respondents' efforts to foreclosure on the Vintage plant in Henderson, on which Respondents had received a first priority deed as security for a supersedeas bond to stay the judgment while the matter was on appeal to the Alabama Supreme Court. The foreclosure hearing was scheduled for August 31, 1989 (*see* Appendix A to this Reply) and Vintage filed its bankruptcy proceeding on August 25, 1989. (*See* Appendix A to the Petition.)

Wright, *Law of Federal Courts* at 745 (4th ed. 1983). Here, Petitioner preserved the issue. Moreover, "[t]here can be no question as to the proper presentation of a federal claim when the highest state court passes on it." *Raley*, 360 U.S. at 436. As shown below, *see infra* at 4-5, the Alabama Supreme Court ruled on the issue. Thus, Respondents' state law arguments are irrelevant.

Respondents also argue that Vintage did not properly present the due process challenge to the Alabama Supreme Court. This argument is wholly untenable. Respondents characterize Vintage's presentation of the due process issue to the Alabama Supreme Court as a "vague reference to the Fourteenth Amendment [that] was insufficient. . . ."[2] Contrary to Respondents' assertion, however, Vintage's due process argument was presented in unmistakable terms.

An excerpt from Vintage's brief before the Alabama Supreme Court setting forth the due process challenge is printed at Appendix G to the Petition before this Court. As that excerpt shows, Vintage cited to the Alabama Supreme Court not only the Due Process Clause, but also (1) the leading Alabama cases on the issue;[3] (2) the only then existing United States Supreme Court opinion

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[2] Brief of Respondents Wayne Jaye and Carolyn Jaye in Opposition to Petition for a Writ of Certiorari to the Supreme Court of Alabama at 7.

[3] *Alabama Power Co. v. Cantrell*, 507 So.2d 1295, 1308 (Ala. 1986) (Maddox, J., concurring); *Aetna Life Insurance Co. v. Lavoie*, 505 So.2d 1050, 1061 (Ala. 1987) (Houston, J., concurring specially).

squarely addressing the issue;[4] (3) an analogous United States Supreme Court case;[5] and (4) a leading law review article on the issue.[6] Thus, it is beyond cavil that Vintage presented its due process argument to the Alabama Supreme Court.[7]

Second, in another effort to stave off consideration of Vintage's Petition, Respondents contend that there is some doubt whether the Alabama Supreme Court actually ruled on the due process issue. Once again, Respondents' position defies logic. As shown above, Vintage presented its due process challenge in plain and detailed terms, and Respondents, of course, had ample opportunity to argue to the Alabama Supreme Court that the issue had not been preserved for review. The opinions rendered in this case and in two companion cases, however, evince that the Alabama Supreme Court ruled on the due process issue.

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[4] *Bankers Life & Casualty Co. v. Crenshaw*, 108 S.Ct. 1645, 1656 (1988) (O'Connor, J., concurring in part and concurring in the judgment).

[5] *Addington v. Texas*, 441 U.S. 418 (1979).

[6] Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139 (1986).

[7] Respondents suggest that Vintage did not challenge the procedures under which former Alabama law imposed punitive damages or the potential for excessive awards under that law. A review of Appendix G to Vintage's Petition demonstrates that Respondents' argument is unfounded. To be sure, the due process argument is developed in greater detail in the Petition before this Court, but there is no requirement that an issue be briefed below and in this Court in precisely the same manner. *E.g., Dewey v. Des Moines*, 173 U.S. 193, 197-198 (1899).

On June 23, 1989, the Alabama Supreme Court issued three opinions in cases raising the due process challenge to Alabama's former punitive damages law. One of those opinions was rendered in this case; it is reprinted at Appendix A to Vintage's Petition. The other two opinions were *Industrial Chemical and Fiberglass Corp. v. Chandler*, Nos. 86-381, 86-385 (Ala. June 23, 1989), which is reprinted at Appendix B to Vintage's Petition, and *Clardy v. Sanders*, 1989 W.L. 99038 (Ala. June 23, 1989), *cert. pending*, U.S. Sup. Ct. No. 89-440.

In *Industrial Chemical*, the Alabama Supreme Court issued an extensive opinion that thoroughly addressed the due process challenge. The due process ruling was the only aspect of *Industrial Chemical* that had any application to the issues raised in the Vintage appeal. In addressing the due process argument in both the Vintage appeal and in *Clardy*, the Alabama Supreme Court incorporated its *Industrial Chemical* opinion of the same day. Surely, it was not necessary for the court to reprint verbatim the *Industrial Chemical* opinion in the Vintage opinion or in *Clardy* to advise readers that its due process decision in *Industrial Chemical* was also its decision on the due process issues raised in the companion cases. Thus, it is sophistry for Respondents to suggest that there is doubt whether the Alabama Supreme Court reached Vintage's due process challenge.

Respondents also imply that it was incumbent upon Vintage to file a motion for reconsideration. They cite no authority, however, imposing any obligation on Vintage to undertake this futile gesture. As noted above, the Alabama Supreme Court had exhaustively discussed the

due process issue in *Industrial Chemical* and had specifically incorporated that opinion in ruling that same day on the due process argument raised in the Vintage appeal and in *Clardy*. Simply stated, the Alabama Supreme Court clearly ruled on the due process challenge, and there was no reason to ask for a reaffirmation of its opinion.

Indeed, this Court has made it clear that a motion for rehearing before the state court is not a condition precedent to a petition for certiorari before this Court where a majority of the highest available state court has ruled on the issue presented. *Local 174, Teamsters Chauffeurs, Warehousemen and Helpers of America v. Lucas Flour Co.*, 369 U.S. 95, 98-101 (1962); C. Wright, *Law of Federal Courts* at 739 (4th ed. 1983); R. Stern, E. Gressman, S. Shapiro, *Supreme Court Practice* at 138-39, 312 (6th ed. 1986). In this case, one member of the Alabama Supreme Court – Chief Justice Hornsby – recused himself because he was the partner of one of Respondents' attorneys when this case was tried. The other Justices all participated in the opinion. Accordingly, no motion for rehearing was even arguably required.[8]

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[8] Respondents suggest that a motion for rehearing would have removed any doubt about whether the Alabama Supreme Court ruled on the due process issue. There is, however, no basis for such doubt. When the Alabama Supreme Court concludes that a due process argument has been waived or improperly presented, its decision is neither doubtful nor ambiguous. *See HealthAmerica v. Menton*, 1989 W.L. 107075 (Ala. July 21, 1989), *cert. pending; Central Alabama Electric Co. v. Tapley*, 546 So. 2d 371 (1989); *Alabama Power Co. v. Cantrell*, 507 So.2d 1295 (Ala. 1986). These opinions either make explicit

(Continued on following page)

Third, in their only argument on the merits, Respondents contend that the constitutional flaws in Alabama's former punitive damages law were cured by the limited trial court review of verdicts under Alabama law. This post-trial review is known as a *"Hammond"* hearing because the Alabama Supreme Court defined its purposes and limits in *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986). The *Hammond* procedure failed to satisfy due process for several reasons.

Under *Hammond*, the trial court could alter a verdict only in extraordinary circumstances.

> [A] jury verdict may not be set aside unless the verdict is flawed, thereby losing its constitutional protection. It is only in those cases that a trial court, pursuant to A.R.Civ.P. 59(f), and this Court, pursuant to Code 1975, § 12-22-71, may interfere with a jury verdict. Insofar as damages are concerned, a jury verdict may be flawed in two ways. First, it may include or exclude a sum which is clearly recoverable or not as a matter of law, or which is totally unsupported by the evidence, where there is an exact standard or rule of law that makes the damages legally and mathematically ascertainable at a precise figure. . . . Second, a jury verdict may be flawed

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findings of waiver or cite case law involving waiver. In the Vintage decision, however, the court made no findings of waiver and cited no waiver precedent. It cited *Industrial Chemical*, which plainly ruled on the merits of the due process issue, as its sole basis for the rejection of Vintage's due process challenge.

> because it results, not from the evidence and applicable law, but from bias, passion, prejudice, corruption, or other improper motive.

493 So.2d at 1378. The first ground authorizing remittitur cited in *Hammond* is plainly inapposite to punitive damages claims. The second ground allowed the trial court to act only in rare cases involving jury "bias, prejudice or corruption." *Id.*

Hammond also explained that, under Alabama's former law, the trial court judge was bound to follow the jury's view of the case: "The cases have consistently held that in deciding whether a jury verdict is excessive because it is the result of passion, bias, corruption, or other improper motive, *a trial judge may not substitute his judgment for that of the jury.*" *Id.* (emphasis added); *see also B&M Homes, Inc. v. Hogan*, 376 So.2d 667 (Ala. 1979); *Vest v. Gay*, 275 Ala. 286, 154 So.2d 297 (1963). Similarly, Alabama appellate courts narrowly circumscribed their review of *Hammond* rulings, inquiring solely whether the trial court considered the appropriate factors.[9] *Hammond*, 493 So.2d at 1379; *Mobile Dodge, Inc. v. Alford*, 487 So.2d 866, 871 (Ala. 1986) ("This Court will not disturb the trial court's ruling on the damages issue unless this Court finds . . . plain and palpable error"); *Vest*, 275 Ala. at 286.

Furthermore, not only did the *Hammond* hearing and appellate review lack meaning, but the process also unfairly shifted to the defendant the heavy burden of

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[9] Alabama's statutory reform of its punitive damages law removed the "presumption of correctness" from both the jury's punitive award and the trial court's ruling on remittitur. Ala. Code Ann. §§ 6-11-23 (a), 6-11-24(a).

producing evidence to overcome the strong presumption of correctness accorded the verdict. A state must provide fundamentally fair procedures for trying claims. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Armstrong v. Manzo*, 380 U.S. 545 (1965). If a procedure establishing liability is inadequate, due process is not satisfied by shifting to the defendant the obligation to submit evidence to set aside the verdict. *Id.*; *cf. Speiser v. Randall*, 357 U.S. 513, 523-24 (1958). Thus, the *Hammond* hearing did not provide review sufficient to satisfy due process.

Finally, the *Hammond* hearing and appellate review were inadequate because they were post-deprivation hearings. Under Alabama law, a judgment is not stayed pending post-judgment review or appeal unless the losing party posts security for the post-judgment review and a supersedeas bond for appellate review. *See* Ala.R.Civ.P. 62(b); Ala.R.App.P. 8(a)(1). The requirement to post a bond or even the threat of execution on the judgment is a deprivation of property. *See, e.g., Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). As shown above, regardless of its timing, the *Hammond* hearing failed to accord due process. Moreover, although post-deprivation review may satisfy due process when the deprivation is the result of a random act, *see Hudson v. Palmer*, 468 U.S. 517 (1984), post-deprivation review is not sufficient to cure due process failings in established state procedures. *See Logan*, 455 U.S. at 435-36; *Armstrong*, 380 U.S. at 551-52.

CONCLUSION

For the reasons stated above and in Vintage's Petition, this Court should issue a writ of certiorari to review the judgment of the Alabama Supreme Court.

This 23rd day of October, 1989.

Respectfully submitted,

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APPENDIX A

STATE OF NORTH CAROLINA COUNTY OF VANCE	THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION BEFORE THE CLERK 89-SP-130
In the Matter of the Foreclosure of the Deed of Trust of VINTAGE ENTERPRISES, INC. Grantor to NICHOLAS LONG, JR. Substitute Trustee	*NOTICE OF FORECLOSURE HEARING* (Filed Aug 18 1989)

As recorded in Deed of Trust Book 644 at Page 100. Vance County Registry.

See appointment of Substitute Trustee as recorded in Book 653, at Page 42. Vance County Registry.

TO: Vintage Enterprises, Inc. (d/b/a Parkway Homes)
c/o Managing Agent
P. O. Box 1208
State Road 1216
Henderson, N.C. 27536

TO: Vintage Enterprises, Inc.
c/o Registered Agent
CT Corporation Systems
3101 Petty Road
Durham, N.C. 27707

You are hereby notified, pursuant to G.S. § 45-21.16, that on the 31st day of August 1989, at 10:30 o'clock a.m. before the Clerk of Superior Court of Vance County, Henderson, North Carolina, a hearing shall be held in the above-entitled matter. The hearing may be continued to a later time or date, in which event you will receive written notice.

You are also hereby notified and should be aware of the following:

1. By Deed of Trust dated November 16, 1988 and recorded in Book 644 at page 100, Vance County Registry securing a Promissory Note to secure a Supersedas [sic] Bond for the Stay of Enforcement of Judgment, in the original principal amount of $650,000.00. Vintage Enterprises, Inc. conveyed its interest in the property owned by it and described as more particularly set forth in the attached Exhibit "A", incorporated herein by reference thereto.

2. The names and addresses of the holders of the Note and Deed or Trust are:

Mr. Wayne Jaye c/o Oliver & Sims 109 Columbus St. Dadeville, GA 36853	Mrs. Carolyn Jaye c/o Oliver & Sims 109 Columbus St. Dadeville, GA 36853

The holders of the Note and Deed of Trust claim that there is a default thereunder.

3. The nature of the default claimed is: a failure to completely satisfy in full the judgment of the trial court, including costs and post-judgment interests upon the affirmation of the judgment of the trial court by the

Alabama Supreme Court, (which affirmation was rendered by the Supreme Court of Alabama on June 23, 1989), as required by the Note and Deed of Trust.

4. Because of the default, the secured creditors. Wayne Jaye and wife Carolyn Jaye have declared the indebtedness secured thereby immediately due and payable and have demanded full satisfaction and payment of the debt.

5. You are no longer permitted to cure the default. To avoid a foreclosure sale you have the right to pay the entire balance of the indebtedness in the amount of $520,000.00 plus interest at the rate of twelve per cent (12.00%) from April 1, 1988, and expenses thereon to date of payment, to Zollicoffer & Zollicoffer, PO Drawer 19, Henderson, North Carolina 27536 in cash or certified funds on/or before the date of the Sale hereinafter set forth.

6. Unless the obligation is earlier satisfied the real estate will be sold at the Vance County Courthouse door at 12:00 Noon on the 28th day of September, 1989 or some later date of which you will be notified pursuant to the provisions of the Deed of Trust and the provisions of Article 2, Chapter 45 of the General Statutes of North Carolina, a copy of the proposed Notice of Foreclosure Sale is attached.

7. You have the right to appear before the Clerk of Court at 10:30 a.m. on the 31st day of August, 1989, in Henderson, North Carolina at which appearance you shall be afforded the opportunity to show cause as to why the foreclosure should not be allowed to be held.

IF YOU DO NOT INTEND TO CONTEST THE CREDITOR'S ALLEGATIONS OF DEFAULT, YOU DO NOT

HAVE TO APPEAR AT THE HEARING AND YOUR FAILURE TO ATTEND THE HEARING WILL NOT AFFECT YOUR RIGHT TO:

(a) PAY THE INDEBTEDNESS AND THEREBY PREVENT THE PROPOSED SALE;

OR

(b) ATTEND THE ACTUAL SALE, SHOULD YOU ELECT TO DO SO.

8. If the proposed sale is consummated, the purchaser at such foreclosure sale will be entitled to possession of the real estate as of the date of delivery of his Deed and if you are still in possession you could then be evicted.

9. You should keep the Substitute Trustee, Nicholas Long, Jr., PO Drawer 19, Henderson, North Carolina 27536, notified in writing of your address so that you can be mailed copies of any further notices of foreclosure setting forth the terms under which the sale will be held, as well as any notice of any postponements of such sale or notice of resale.

This 17th day of August, 1989.

/s/ Nicholas Long, Jr., Substitute Trustee

Nicholas Long, Jr., Substitute Trustee
Zollicoffer & Zollicoffer
215 North Garnett Street
PO Drawer 19
Henderson, North Carolina 27536
Telephone: (919) 438-4134